Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a railroad can be held liable under the Safety Appliance Act, 49 U.S.C. § 20302(a)(1)(A), for an employee's injury when a failure to couple is due to operational factors and is not caused by a defective device.

LIST OF PARTIES AND RULE 29.1 LIST

The only parties to this proceeding are the petitioner Illinois Central Railroad and the respondent Steve DeBiasio.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Illinois Central Railroad's parent corporation is Illinois Central Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Illinois Central Railroad, respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit, affirming a judgment entered on a jury's verdict by Judge Anthony A. Alaimo, visiting judge in the United States District Court for the Northern District of Illinois. Petitioner respectfully requests that this Court grant its petition for a writ of certiorari and that this Court withhold its decision until such time as this Court has ruled in the recently accepted case *Hiles v. Norfolk & Western Ry. Co.*, 644 N.E.2d 508 (5th Dist. 1994), petition for leave to appeal denied, 161 Ill. 2d 526 (Ill. 1995); *cert. granted*, ____ U.S. ____ (1995), (renumbered 95-6, October Term, 1995), for the reason that this Court's decision in *Hiles* will obtain herein. If this Court

decides in *Hiles* that railroads are entitled to introduce evidence in a case under Section 2 that their equipment was not defective, then the trial court's exclusion of evidence establishing that Illinois Central's equipment was not defective is reversible error. Illinois Central should be entitled to a new trial to show that its equipment was not defective.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. at 1a-19a) is reported at 52 F.3d 678. The order of the United States Court of Appeals for the Seventh Circuit, denying petitioner's petition for rehearing with suggestion for rehearing *en banc*, (App. at 22a) is not reported. The order of the United States Court of Appeals for the Seventh Circuit, denying petitioner's motion to stay issuance of mandate (App. at 21a) is not reported. The order of the United States Court of Appeals for the Seventh Circuit, issuing its mandate (App. at 20a) is not reported. The judgment of the United States District Court for the Northern District of Illinois (App. at 25a-26a) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit, was entered on April 13, 1995. The United States Court of Appeals for the Seventh Circuit entered its order denying petitioner's petition for rehearing and suggestion for rehearing *en banc*, on July 17, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

During the period relevant to this case, the federal Safety Appliance Act ("SAA") provided in pertinent part:

> [I]t shall be unlawful for any . . . common carrier [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2.[1]

STATEMENT OF THE CASE

1. Respondent, Steve DeBiasio, an employee of petitioner, Illinois Central Railroad, was a switchman on a switching crew at petitioner's Glenn Yard in Chicago, Illinois. His duties at the time included aligning switches in the yard for the flat switching operation and checking to see if rail cars coupled on impact.

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[1] Congress revised the provision effective July 5, 1994 and transferred it to 49 U.S.C. § 20302(a), which states in relevant part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles. . . .

In amending the statute, Congress expressly provided that it was making "no substantive change in the law" and not "impair[ing] the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103rd Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. Petitioner will refer to the current version of the statute, 49 U.S.C. § 20302(a), in this petition.

Railroad cars are connected together by the use of a coupling mechanism located at either end of each car. Each railroad car has an "A" end and a "B" end. The standard coupling mechanism on a railroad car consists of a knuckle, which opens and closes, connected to a drawbar that is fastened to a housing mechanism on the car.

The knuckle is a sort of clamp with a movable jaw that can be opened and closed. The jaw of the knuckle is opened by pulling up on a lever on the side of the car known as a pin lifter. The pin lifter is a bar that is connected to the pin in the knuckle housing. The pin locks the knuckle in a closed position. When the pin lifter is pulled up, it lifts the pin in the knuckle housing and unlocks the knuckle. A mechanical piece known as a knuckle thrower, which is also inside the knuckle housing, then throws the jaw of the unlocked knuckle open. The knuckle thrower is a piece of cast steel in the shape of an "S."

In order for a coupling to occur on impact, it is necessary that certain operations be done by the crew. First, the knuckle on at least one of the cars being coupled must be open. Second, the drawbars of the cars must be properly aligned. The drawbars rest on a pivot which provides for lateral movement so that cars do not derail when travelling on curved track. Due to this lateral play of the drawbars, the drawbars can at times be misaligned during coupling. When such misalignment occurs, the drawbars must be realigned manually. Third, the crew must make certain that the impact speed of the cars is not excessive so that the jaw of the open knuckle or knuckles can close and form a firm connection between the cars.

During flat switching operations cars are released or "cut" from a train and rolled down the lead track into various switching tracks depending on how the switches on the

lead track are set. In a flat switching operation, an engineer begins to back up the train towards a designated track. The crew has a switch list which indicates the order in which the cars are going to be switched into each track. The switching engine pushes the train of cars until the engineer receives a signal to stop. The stop signal is given after the pin lifter has been lifted on the appropriate car. After the pin has been lifted and the engineer stops the train, the momentum of the train sends the now unattached cars or "cut" of cars down the lead track into the switching tracks. The cut of cars travel down into the switching track and can impact with the cars already sitting on that track. The engineer's operation of the engine determines the rate of speed the cars are released into the switch tracks.

On February 6, 1992 respondent was working as a switchman at petitioner's rail yard. His crew included John Smith, the engineer operating the switching engine, Tony Manestar, the conductor in charge of the crew, and Johnny Wilson, the utility switchman who was lifting the pin lifters to release cars during the switching operation. Respondent was the field switchman responsible for opening and closing the switches so that the cars would roll into the proper switching tracks.

At the time of respondent's accident the crew had connected 22 cars to the switching engine and was in the process of switching those cars into various switch tracks. In the second switching movement of the 22 cars, three cars were sent, or "kicked," onto track 8. Wilson testified that he pulled the pin lifter on Illinois Central car 388423 to release the cut of three cars onto track 8. Wilson did not have any trouble opening the coupler on the "A" end on IC car 388423 before respondent's accident. The next movement of cars was a cut of six cars for track 3. IC

car 388423 was the lead car travelling into track 3 and its lead coupler which was on the "A" end of the car was open as it was released towards track 3. No one witnessed IC car 388423 make contact with the railroad cars already on track 3. Respondent and Tony Manestar both heard IC car 388423 impact with the cars already on track 3.

Respondent walked down to the area of track 3 and discovered a gap of 20-25 feet between IC car 388423 and the standing cars on track 3. Respondent testified that the knuckle on the coupling mechanism for the "A" end of car 388423 was closed, when it previously had been open. Respondent testified that he then proceeded to attempt to open the knuckle on the "A" end of IC car 388423 with the pin lifter so as to prepare the cars for a second attempt at automatic coupling. Other than respondent's unsubstantiated testimony that the coupler at the "A" end of IC car 388423 did not work at that time despite the fact that it had worked just moments before for Johnny Wilson, there is no evidence of any malfunction of the equipment. Respondent further testified that he had to place one foot inside the rail and between the cars in order to try to manually open the knuckle at which time two other cars destined for track 3 collided with the cut of six cars of which IC car 388423 was a part, causing respondent to be knocked over. His left arm was caught under the wheels of one of the cars, resulting in its amputation at the shoulder.

Respondent testified that he could not recall whether or not the drawbars for IC car 388423 and the rail car on which car 388423 had impacted were in proper alignment. Respondent testified at trial that the coupler on the rail car already on track 3 was closed. Respondent testified that an open coupler such as the one on the "A" end of IC car 388423 can be caused to close by the vibra-

tion of the car travelling down the switch tracks. Therefore, it is possible that both couplers of the cars were closed at the time of impact and that would explain why a coupling upon impact did not occur. Respondent also testified that in his experience a coupler can be open but that at the time of impact the receiving car is pushed away due to the impact speed before the open knuckle closes. This would result in a non-coupling and IC car 388423 having a coupler which was closed. Respondent further testified that this occurs without any defect in the equipment. Respondent's expert testified similarly.

The coupler on the A end of IC car 388423 was inspected later on February 6, 1992 by Mr. M.O. Jones, an employee of petitioner. Jones noted that the coupler operated properly at the time of his inspection. Jones found no defective parts during his inspection and specifically testified that the knuckle thrower on the "A" end coupler of IC car 388423 was not broken when he inspected the car.

Respondent ultimately abandoned his unsubstantiated theory of malfunction of the coupler by retaining two experts who both specifically limited their opinions to be that the only piece of equipment which was defective was the knuckle thrower inside the "A" end coupler on IC car 388423. Respondent's expert, R.E. Dipprey, testified that in his opinion the knuckle thrower on IC car 388423 was inoperative at the time of respondent's accident because it was broken or fractured. Respondent's expert, Frank Appelt, also testified that in his opinion the knuckle thrower for the coupler on the "A" end of IC car 388423 had to be broken at the time of respondent's accident. Respondent's experts admitted that if the knuckle thrower was not broken then the coupler was not defective. Neither of respondent's experts inspected the subject knuckle thrower prior to trial. Indeed, respondent never requested production of the subject knuckle thrower at any time.

David Hall of the Illinois Central Railroad testified that he gathered information concerning any repairs to the coupler on the "A" end of IC car 388423. The records of the Illinois Central Railroad indicate that no repairs were made to the knuckler thrower in the subject coupler since the date of the accident. Mr. Hall asked Mr. Jones to locate IC car 388423 and remove the knuckle thrower from the coupler on the "A" end of the car. Mr. Jones did so and the knuckle thrower was brought to Chicago for purposes of use as impeachment of respondent's experts at the time of trial.

Petitioner sought to impeach respondent's experts with the subject knuckle thrower, which was marked as Exhibit 33 at trial. Petitioner elicited admissions from respondent's expert Appelt that Exhibit 33 was a knuckle thrower and that it was not broken. However, due to a ruling by the court, petitioner was not allowed to tie up the impeachment of respondent's experts regarding their opinions that there was defective equipment involved in the form of a broken knuckle thrower. The trial court would not allow Jones to testify that he had retrieved Exhibit 33 from the "A" end of IC car 388423. The trial court barred this chain of custody testimony by granting respondent's motion to bar such testimony as being undisclosed *expert* opinion testimony. Due to the trial court's ruling, petitioner was not able to impeach respondent's experts that the subject knuckle thrower was not defective.

2. Respondent filed suit on April 3, 1992 in the United States District Court for the Northern District of Illinois, Eastern Division, alleging in one count that petitioner violated the Federal Employer's Liability Act, 45 U.S.C. § 51. Respondent filed a separate count alleging violations of Section 2 of the Federal Safety Appliance Act. *See* 49 U.S.C. § 20302(a)(1)(A). The SAA makes it unlawful for

a railroad to use any car not "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A).

During trial, petitioner filed a motion for a directed verdict on respondent's FELA and SAA causes of action arguing that respondent had produced no evidence of violations of the FELA or of a defect in the coupling mechanism alleged to have caused respondent's injury. The court denied this motion. Instead, the court allowed respondent's case in its entirety, both under FELA and SAA, to go to the jury.

Petitioner sought to impeach respondent's experts with Exhibit 33. Despite the fact respondent never requested that the subject knuckle thrower be produced at any time, respondent's counsel described it at trial while arguing to bar Jones' testimony as "the most important bit of physical evidence" in the case. Petitioner made an offer of proof of evidence that the part of the coupling mechanism which respondent's experts opined "had to be broken" at the time of the accident was in fact not defective in any way. This offer of proof consisted of informing the court that Jones would provide non-expert chain of custody testimony that Jones retrieved the knuckle thrower marked as Exhibit 33 from IC car 388423 and brought it to defense counsel's office. The court excluded the evidence of Jones' testimony that he retrieved the knuckle thrower from the subject IC car 388423. Therefore, the jury never learned that the unbroken knuckle thrower marked as Exhibit 33 was the actual knuckler thrower in the knuckle of IC car 388423 which had remained in service continuously since the accident date.

After the court barred the key testimony of Jones, which was later found by the Seventh Circuit Court of

Appeals, to be an abuse of discretion and error regarding a significant evidentiary ruling, the jury awarded respondent $4,201,000 in damages on May 23, 1994. Judgment was entered against the railroad on July 21, 1994.

3. The United States Court of Appeals, Seventh Circuit affirmed the district court on April 13, 1995. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995). The court found that the "trial court erred in a significant evidentiary ruling" regarding M.O. Jones' testimony about the knuckle thrower. *DeBiasio*, slip op. at p. 1. However, the United States Court of Appeals, Seventh Circuit went on to find that such error was harmless as a matter of law. While the court recognized that the authentication of the knuckle thrower would have impeached respondent's experts' opinions that the coupling mechanism on IC car 388423 was defective, the court held that the exclusion of this evidence was harmless because it held as a matter of law that the only two defenses available to a railroad to a SAA claim are the operational circumstances of a misaligned drawbar and closed knuckles. The Seventh Circuit further found that petitioner failed to provide any evidence to support a misaligned drawbar or closed knuckle defense. The Seventh Circuit did not find the operational circumstance of impact speed to be a defense, notwithstanding respondent's own testimony and the testimony of his expert that nondefective couplers might not couple on impact due to the speed of the impact.

The improperly excluded testimony of M.O. Jones would have directly impeached respondent's experts regarding their sole defective equipment theory under the SAA. Respondent's experts had already opined that without a defective knuckle thrower, respondent's accident would not have occurred. Had the Seventh Circuit properly recognized the operational circumstance of impact speed as a

defense, similar to closed knuckles or misaligned drawbars, the trial court's ruling excluding impeachment evidence of the nondefective condition of the knuckle thrower becomes clearly prejudicial and reversible error.

REASONS FOR GRANTING THE PETITION

A fair review of the case law interpreting the SAA requirement that railroad cars be equipped with "couplers, coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles" 49 U.S.C. § 20302(a)(1)(A) evidences a clear division between the federal circuits and between federal and state decisions. Several compelling reasons exist for this Court to grant certiorari to review the decision of the United States Court of Appeals, Seventh Circuit.

First, the decision below, holding that a failure to couple on impact triggers a railroad's absolute liability under the SAA where there is no defect in the equipment but rather, where the failure to couple results from operational circumstances, incorrectly interprets the statute's requirements and conflicts with this Court's interpretation of the SAA. By "operational circumstances," petitioner simply means those situations that normally occur during railroad operations when equipment is in good working condition which prevent a coupling from occurring. Examples include closed knuckles, misaligned drawbars and the impact speed of the cars to be coupled. *Hiles* involved a misaligned drawbar. This case involves impact speed. The Seventh Circuit's opinion below gives 49 U.S.C. § 20302(a)(1)(A) an overly broad application to cover operational matters as opposed to equipment requirements. The Seventh Circuit improperly applied this Court's decision in *Affolder v. New*

York, Chicago & St. L. R.R., 339 U.S. 96 (1950). Therefore, the Seventh Circuit's decision does not conform with this Court's interpretation of the SAA. Accordingly, the decision below should be reviewed and reversed.

Second, in a direct conflict with the decision of the United States Court of Appeals, Third Circuit, the Seventh Circuit held that only two narrow defenses exist to a claimed violation of the SAA requirement that railroad cars be equipped with "couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A). What the Seventh Circuit failed to recognize is that the United States Court of Appeals, Third Circuit in *Reed v. Philadelphia, Bethlehem & New Eng Ry.*, 939 F.2d 128 (3d Cir. 1991), in following this Court's decision in *Affolder v. New York, Chicago & St. L. R.R.*, 339 U.S. 96 (1950), held that operational circumstances which are non-equipment related do not give rise to a cause of action under the SAA when the equipment involved is not defective. The Seventh Circuit's failure to grasp fully the import of this Court's decision in *Affolder* and the Third Circuit's decision in *Reed* resulted in an overly expansive interpretation of the scope of the SAA and an unduly restrictive view of the scope of defenses available to a railroad to a SAA claim. Specifically, the Seventh Circuit erroneously held that the operational circumstance of impact speed of rail cars which can cause the cars to move away from each other before a coupling can occur gives rise to a cause of action under the SAA notwithstanding the fact that there is no defect in the coupling mechanism. Such a finding by the Seventh Circuit directly conflicts with the Third Circuit's decision in *Reed* wherein it was held that a failure to couple on impact by nondefective equipment due to operational circumstances did not give rise to a cause of action under

the SAA. While the Third Circuit's decision in *Reed* involved a misaligned drawbar, the same rationale which resulted in the Third Circuit's application of the holding of *Affolder* to misaligned drawbars should obtain with equal force to impact speed or any other legitimate operational circumstance where there is no defect in the equipment.

Third, the Seventh Circuit's decision below is inconsistent with its own previous decision in *Lisek v. Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 904 (1995). In *Lisek*, the Seventh Circuit held that the operational circumstance of a misaligned drawbar does not automatically violate the SAA. The *Lisek* decision correctly interpreted this Court's decision in *Affolder*. Closed knuckles and misaligned drawbars are two operational circumstances which are recognized as defenses to a SAA claim. Logic and consistency dictate that the impact speed of the cars involved in a failed coupling where there is no defective equipment is an analogous operational circumstance, which, if proven, is a defense to a claim under the SAA, an equipment safety statute. The Seventh Circuit's arbitrary and inconsistent decision below regarding the scope of the SAA and available defenses must be reviewed and reversed.

Finally, this case involves a serious question of construction of a statute of nationwide importance. "Such questions of construction are among the most important issues for final determination by this Court." *See e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 441 (1958) (Harlan, J. concurring). Review by this Court is crucial to assure uniformity in the interpretation of federal law by the federal circuits. At the present time, there is a significant split among the federal circuits as to the scope of the SAA and the defenses that are available to a railroad in a SAA cause of action.

1. The Seventh Circuit misinterpreted 49 U.S.C. § 20302 (a)(1)(A), as well as this Court's precedent in holding that closed knuckles and misaligned drawbars are the only operational defenses to a claim under the SAA. That misinterpretation resulted in the Seventh Circuit finding that the trial court's error excluding key impeachment evidence was mere harmless error. The Seventh Circuit's erroneous interpretation of the SAA and this Court's prior decisions necessitates this Court's review.

The SAA is an equipment safety statute. *Maldonado v. Missouri Pac. Ry.*, 798 F.2d 764, 768 (5th Cir. 1986), *cert. denied*, 480 U.S. 932. As an equipment safety statute, the SAA prescribes certain equipment which is mandatory in the railroad industry. The SAA does not cover operating procedures of the railroad. The statute simply requires that rail cars must be equipped with automatic couplers. 49 U.S.C. § 20302(a). The clear language of the statute does not deal with operation problems with equipment that otherwise complies with the statute. *United Transp. Union v. Lewis*, 711 F.2d 233, 251 (D.C. Cir. 1983). There is no dispute in this case that the rail cars involved in the switching operation on the date of respondent's accident were equipped with automatic couplers. Under the plain language of the SAA, a railroad cannot be held strictly liable under the statute when its cars are shown to be equipped with nondefective equipment and the failure to couple is a result of normal operational circumstances. *See e.g., Towles v. Burlington N.R.R.*, No. CS-93-270-JBH, 1994 WL 151073 (E.D. Wash. April 20, 1994).

This Court previously acknowledged that it has left open the issue of whether "the failure of a couple to work *at anytime* sustains a charge that the Act has been violated." *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 483-84 (1916) (emphasis added). In *Affolder*

v. New York, Chicago & St. L.R.R., 339 U.S. 96, 99 (1950), this Court held that a plaintiff under Section 2 of the SAA did not have to show a defect if the coupler did not perform properly in the switching operation. The Court also held, however, that the railroad had a "good defense" if the failure of the two cars to couple on impact was because the coupler on one of the cars had not been properly opened. *Id.* at 99. Thus, if the failure to couple was due to operational circumstances of not properly setting the couplers, the railroad had a "good defense" to a claim under the SAA. *Id.* The Court in *Affolder* held that plaintiff need not prove a specific defect in the coupler to sustain a cause of action under the SAA, *assuming that the coupler was properly set* and therefore that operational circumstances could not explain the failure of the cars to couple. The compelling conclusion of the *Affolder* Court's decision therefore is that if operational circumstances *can* explain why the cars failed to couple and the railroad can affirmatively establish that no defect existed in the equipment then it has a complete defense to a SAA claim.

The Court in *Affolder* held that closed knuckles meant a coupler was not properly set and that the railroad was thereby not liable under the SAA. The Court in *Affolder* did not specifically reach the question of whether other operational circumstances such as drawbar misalignment or impact speed of the cars or other recognized causes of failed coupling, constituted *per se* violations of the SAA. Logic dictates that the *Affolder* precondition to absolute liability under the SAA requiring that couplers be "properly set" applies equally to other operational circumstances such as misaligned drawbars and impact speed of the cars at the time of coupling when the equipment involved is nondefective. How can a railroad be absolutely liable for a failed coupling when nondefective couplers are not given a fair chance to work? The Seventh Circuit's failure to

acknowledge impact speed at the time of coupling as an operational circumstance which does not *per se* violate the SAA resulted in its ruling below that the trial court's abuse of discretion and error in excluding key impeachment evidence regarding the nondefective condition of the knuckle thrower was merely harmless error. Pursuant to this Court's statement of the law under *Affolder*, the Seventh Circuit should have recognized impact speed as an operational circumstance that is not covered by the SAA, an equipment safety statute, and the trial court's error in not allowing petitioner to impeach respondent's experts on their opinions that the knuckle thrower was defective is prejudicial and reversible error. Pursuant to *Affolder*, petitioner had available to it the defense of operational circumstances and further was entitled to establish through the impeachment of respondent's experts that no specific defect as opined by respondent's experts existed in the knuckle thrower. Such proof of a lack of defect would have established a complete defense to respondent's SAA claim.

Because the *Affolder* defense of closed knuckles logically applies to other operational circumstances such as misaligned drawbars and impact speed of the cars at the time of coupling, the Seventh Circuit erred in finding that the trial court's error in excluding impeachment evidence regarding Exhibit 33, the knuckle thrower from the knuckle in question, was mere harmless error. The Seventh Circuit's opinion should be reversed and therefore certiorari should be granted. Further, this case should be held until this Court has ruled in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995 because *Hiles* involved the operational circumstance of a misaligned drawbar while this case involves the similar issue of the operational circumstance of impact speed.

2. There is a significant split among federal circuits on the scope of the SAA and the defenses available under the SAA. Further, a majority of federal circuits are also split with state courts on these matters. The decision below conflicts with the overwhelming trend of current federal case law interpreting this provision of the SAA. In this respect, the issue presented in this case is similar to the case *Hiles v. Norfolk & Western Ry. Co.*, 644 N.E.2d 508 (5th Dist. 1994); petition for leave to appeal denied, 161 Ill. 2d 526 (Ill. 1995); *cert. granted*, ____ U.S. ____ (1995), (renumbered 95-6 October Term, 1995), which was just granted certiorari by this Court.

As pointed out by petitioner in *Hiles v. Norfolk & W. Ry. Co.*, "since 1986, every federal court deciding this issue—the Third, Fourth, Fifth and Sixth Circuits—has held that a railroad has not violated the SAA where its coupling equipment was nondefective and operating properly." *See* Petitioner's Petition in *Hiles* at p. 9. Under these cases, it was the operational circumstance of the existence of a misaligned drawbar which was found not to violate the SAA. The courts held that the railroad may, as a defense, show that the misaligned drawbar was not defective. *Kavorkian v. CSX Transp. Inc.*, 33 F.3d 570, (6th Cir. 1994); *Goedel v. Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Reed v. Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado v. Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

The minority view in the federal circuits was announced in an earlier pair of federal cases which held that a railroad employee proves a violation of the SAA by showing he went between two cars to align an improperly aligned drawbar. *Coleman v. Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe v. Atchison, Topeka & Santa Fe*

Ry., 491 F.2d 892 (10th Cir. 1974). State courts have also generally held that a failure to couple because of operational circumstances resulting in drawbar misalignment constitutes a *per se* violation of the Act. See *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York and Utah). The state court and minority federal court line of cases plainly conflicts with the more recent line of federal court of appeals decisions.

The recent trend of federal decisions hold that injury due to normal operations of nondefective equipment does not constitute a *per se* violation of the SAA, and a railroad is permitted to prove in its defense that operational circumstances, not defective equipment, was the cause of a coupling not occurring on impact. Under the majority view and current trend in federal court, involving a failed attempt at coupling, a failure to couple caused by a nondefective equipment does not trigger absolute liability under the SAA. *Kavorkian*, 33 F.3d 570; *Reed*, 939 F.2d 128; *Maldonado*, 798 F.2d 764; *Towles v. Burlington N. R.R.*, No. CS-93-270-JBH, 1994 WL 151073 (E.D. Wash. Apr. 20, 1994).

In *Kavorkian*, the Sixth Circuit held that a railroad will not be liable under the SAA for injuries proceeding from a failed coupling due to the operational circumstances of misaligned drawbars. *Kavorkian*, 33 F.3d at 576. Any danger workers face in realigning a nondefective drawbar is beyond the scope of the statute. *Id.* at 575. Similarly, the Third Circuit in *Reed* held that where misaligned drawbars fail to couple, a railroad will not be liable if it can show that the equipment was not defective. *Reed*, 939 F.2d at 128, 132. A mere failure to couple does not violate the SAA. *Id.* at 132.

In sum, there exists a concrete conflict between state courts and a majority of the federal circuits as well as an acknowledged split between the federal circuits concerning the correct interpretation of Section 2 of the SAA regarding whether there is a violation of the SAA when an employee is injured due to normal operational activities and circumstances involving nondefective equipment. This Court should grant this petition and establish a uniform interpretation of this provision to create much-needed consistency among lower state and federal courts.

3. Similar to the significant split among the federal circuits on the issue raised in this case and the split between the majority of federal circuits with the state courts on the same issue, the Seventh Circuit's decision below is inconsistent with its own previous decision in *Lisek v. Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995). In its decision below, the Seventh Circuit narrowly interpreted the defenses available to a railroad in a claim under the SAA. The Seventh Circuit below stated that only "two narrow defenses" exist "which, if properly proven by the railroad, may allow it to avoid liability." *DeBiasio*, slip op. No. 94-3000, at p.1. The court below referred to the two narrow defenses as being closed knuckles and a misaligned drawbar. *Id.*

While no court has specifically held that the operational circumstance of impact speed is an available defense to a railroad in a SAA case, such a finding adheres to this Court's decision in *Affolder* and the decisions of the various federal circuit courts which have recognized the defense of a misaligned drawbar. Closed knuckles and misaligned drawbars are operational circumstances that do not come under the purview of the SAA, an equipment safety statute. The Seventh Circuit improperly refused

to recognize the operational circumstance of impact speed as an available defense to petitioner in this case. In *Lisek*, the Seventh Circuit recognized the defense of a misaligned drawbar. In so doing, the Seventh Circuit in *Lisek* referred to the Third Circuit's previous decision in *Reed* which recognized the defense of drawbar misalignment. *Lisek*, 30 F.3d at 828. Perhaps, the Seventh Circuit would have failed to recognize the defense of misaligned drawbar in *Lisek* had other federal circuit courts not previously interpreted this Court's holding in *Affolder* correctly to include other operational circumstances such as a misaligned drawbar. No decision of this Court has held that closed knuckles is the *only* operational circumstance which gives rise to a defense by the railroad under the SAA. The Seventh Circuit's decision which failed to recognize the operational circumstance of impact speed of nondefective equipment as an available defense to petitioner was an overly restrictive view of the defenses available under the SAA according to the clear language of the statute and according to this Court's previous decisions.

There is no rational basis for the Seventh Circuit to arbitrarily include the defense of the operational circumstance of misaligned drawbar that prevents coupling in *Lisek* and not recognize the operational circumstance defense of impact speed that prevented coupling in this case. Had the Seventh Circuit recognized petitioner's defense of impact speed in this case, the Seventh Circuit would have been compelled to find that the trial court's ruling excluding key impeachment evidence of respondent's experts regarding the nondefective condition of the knuckle thrower was prejudicial and reversible error entitling petitioner to a new trial on all issues.

4. By their conflicting opinions, federal and state courts have demonstrated a pressing need for guidance from this

Court on the scope of the SAA and the defenses available to a railroad to a claim brought under the SAA. The fact that there have been so many cases involving these issues and the evident conflict in the decisions of the various federal circuits and state courts, demonstrates the need for a pronouncement by this Court so that uniformity exists and disparity and inconsistency do not control this issue. The issue will undoubtedly recur; railway employees will certainly continue to sue railroads under the SAA for injuries sustained when an automatic coupling does not occur due to operational circumstances in which nondefective equipment is involved. The issue involved in this case is similar to the issue currently before this Court in the *Hiles* case.

Additionally, had the Seventh Circuit followed its own previous interpretation of the SAA and this Court's decision in *Affolder*, petitioner would have had a complete defense to respondent's SAA claim in this case because respondent could show no evidence that the equipment, here the knuckle thrower, was defective. For the railroad to be held absolutely and strictly liable under an equipment safety statute for an accident which arose due to operational circumstances wherein the evidence the railroad was erroneously prevented from introducing would have proven that the equipment was nondefective is an unjust result. Alleged operational negligence is covered by the Federal Employer's Liability Act, 45 U.S.C. § 51. The proper scope of the SAA, an equipment safety statute, does not and should not cover the circumstances involved in this case.

CONCLUSION

The petition for a writ of certiorari should be granted and this Court should withhold its decision until it has ruled in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995.

Respectfully submitted,

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October 11, 1995

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-3000

STEVE DEBIASIO,

Plaintiff-Appellee,

v.

ILLINOIS CENTRAL RAILROAD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2281—**Anthony A. Alaimo,** *Judge.*

ARGUED JANUARY 10, 1995—DECIDED APRIL 13, 1995

Before ESCHBACH, COFFEY, and RIPPLE, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* Steve DeBiasio was seriously injured while in the employment of the Illinois Central Railroad ("IC"). DeBiasio brought this action against IC alleging violations of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, and the Federal Safety Appliance Act ("FSAA"), 45 U.S.C. §§ 1-43. The jury found IC liable under both Acts and awarded DeBiasio $4,201,000 in damages. IC appeals the finding of liability and the award of damages. As to the issue of liability, IC challenges the sufficiency of the evidence and certain evidentiary rulings of the trial court. We have concluded that the evidence was sufficient and, while the trial court erred in a significant evidentiary ruling, such error was harmless. We affirm.

I.

Railroads connect individual freight cars together through a coupling mechanism located at either end of each car. The coupling mechanism consists of a drawbar and a knuckle that connects with an adjacent car. A pin inside the coupler knuckle locks the knuckle in a closed position. Using a "pin lifter" or uncoupling lever, the pin can be removed and the knuckle can be opened without having to step between the rails. As long as the couplers on both cars are set properly so that the drawbar, which rests on a pivot to allow the car to round curves without derailing, is aligned and at least one of the knuckles is open, two cars will connect automatically upon impact.

In a classification or switching yard, the railroad is able to separate freight cars which are currently coupled together and reassemble them with other cars having common destinations. The yard normally consists of "lead" tracks, where inbound trains come in and wait to be switched, and a number of individual tracks where the reassembled cars are placed. During a "flat switching" operation, an engineer begins to back up a set of cars toward a designated track. The switch list indicates in what order cars are going to be switched into each track. A switchman then uncouples a group or "cut" of cars by pulling the pin lifter attached to the front coupling mechanism on the following car. When the pin is lifted, the engine stops and its momentum sends the now unattached cars into the bowl-shaped area of the yard. The descending cars are directed into the appropriate track according to the switch list where they are automatically coupled upon impact with the cars presently sitting in that track.

In the early hours of the morning on February 6, 1992, DeBiasio was performing his duties as a switchman for IC at its Glenn Yard in Chicago. DeBiasio was then 33 years old and had worked for IC for 13 years. His crew included John Smith, the engineer operating the switching engine, Tony Manestar, the conductor in charge of the crew, and, Johnny Wilson, the utility switchman who at

the time was lifting the pins to release cars to one of the Yard's twenty tracks. DeBiasio was the field switchman responsible for opening and closing the switches so that the cars would roll into the proper tracks, and checking to see if the cars coupled on impact with the cars already standing on those tracks.

DeBiasio's shift had started at 10:30 pm. After the crew ate "lunch" at around 2:00 in the morning, Manestar distributed the switch list for the rest of the shift's operations. Smith lined a cut of 22 cars onto the switching lead for tracks 1-10. In the second movement of cars after lunch, three cars were sent, or "kicked," onto track 8. Wilson testified that he was able to pull the pin on the coupler connecting the last car to remain with the train with the three cars to be released, and the momentum of the three cars' release opened up the knuckle on IC car 388423 which remained and became the lead car for the next cut of cars. Thus, on the subsequent movement, when six cars were released for track 3, the lead car's coupler was in the open position, ready for coupling. After DeBiasio flipped the switch for track 3 in preparation for this movement, he informed Manestar by radio that there was insufficient room in track 3 for the scheduled six cars. When this happens, a cut of cars may "foul" the lead track, so that the cars do not go completely onto the designated track and thus block the lead track. DeBiasio thus returned to track 3 to check on the progress of the six cars which had already been released. As DeBiasio was walking along the lead to track 3, he heard the 6 cars make contact with the cars already on that track. Listening to his radio, DeBiasio heard that the fourth movement of cars had also taken place and they were now planning on sending 2 additional cars to track 3. When he heard the impact of these two cars on the six other cars presently on track 3, he assumed that track 3 was no longer a "live" track and the other switch movements would not affect his ability to inspect the six cars on track 3.

DeBiasio discovered that there was a gap of 20-25 feet between car 388423 and the standing cars on track 3. He

noticed that the knuckle on car 388423's coupling mechanism was now closed when it previously had been open. Thus, he believed the cars had failed to couple automatically upon impact. DeBiasio then proceeded to attempt to open the knuckle on car 388423 with the pin lifter so as to prepare the cars for a second attempt at automatic coupling. After several failed attempts with the pin lifter, DeBiasio had to place one foot inside the rail and between the cars in order to try to manually open the knuckle. At this point, DeBiasio heard a loud impact against the cars on track 3 and was pushed over by the oncoming cut of cars. His left arm was caught under the wheels of one of the cars, resulting in its amputation at the shoulder.

On April 3, 1992, DeBiasio brought this action against IC alleging negligence in violation of FELA, and the failure to maintain couplers which couple automatically upon impact, in violation of FSAA. The case went to trial before a jury on May 18, 1994. The jury returned a verdict in favor of DeBiasio and awarded $4,201,000 in damages. The district court denied IC's motions for judgment as a matter of law, or, in the alternative, for a new trial on all issues, or in the alternative for a new trial on damages or a remittitur. A timely motion of appeal was filed.

II.

IC claims three grounds for reversal of all or part of the jury's verdict: (1) insufficiency of the evidence as a matter of law; (2) errors in the admission and exclusion of certain evidence; and (3) excessiveness of the verdict and a failure to mitigate damages.[1] We will address each issue in turn.

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[1] IC also cites to several portions of the trial transcript where the trial judge made statements which allegedly biased or prejudiced IC's counsel in the presentation of its defense. A careful review of the trial transcript in its entirety indicates that this claim has so little merit that we need not address it further.

A. Judgment as a Matter of Law and Motion for a New Trial

DeBiasio's claim rests on alleged violations of FSAA and FELA. At the conclusion of the presentation of the evidence, IC moved for judgment as a matter of law on these claims. We review *de novo* the district court's denial of a motion for judgment as a matter of law. *Frazier v. Norfolk & Western Ry. Co.*, 996 F.2d 922, 924 (7th Cir. 1993). Our inquiry is limited to whether the evidence, when viewed in the light most favorable to the nonmoving party and drawing all reasonable inferences therefrom, is sufficient to support the jury's verdict. *Id.* (quoting *Siddiqi v. Leak*, 880 F.2d 904, 908 (7th Cir. 1989)). After the jury's verdict, IC also moved for a new trial, contending that the verdict was against the manifest weight of the evidence. We will reverse the district court's decision to deny IC's motion for a new trial only if an abuse of discretion is demonstrated. *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991).

1. FSAA

The FSAA imposes certain absolute duties upon railroads to outfit their cars with safe equipment. "[A] failure of equipment to perform as required by the Safety Appliance Act [FSAA] is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." *O'Donnell v. Elgin J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949). "Once the violation is established, only causal relation is in issue." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). Although the FSAA does not itself create a private right of action, employees alleging injury resulting from a violation of the FSAA may sue under FELA, 45 U.S.C. § 51. *See Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969).

DeBiasio claims that IC has violated § 2 of the FSAA, which provides as follows:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2. Congress enacted this provision in 1893 in an effort to reduce the number of injuries which occurred when railroad workers were forced to stand between the cars as they moved, sometimes at speeds reaching 12 miles per hour, during the coupling process. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823, 826 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995) (citing *United Transp. Union v. Lewis*, 711 F.2d 233, 247 n. 34 (D.C. Cir. 1983)). Although the statutory language itself only speaks to the risk of requiring railroad workers to go between the ends of two cars to uncouple them, the Supreme Court has long held that this language applies to coupling as well as to uncoupling. *Johnson v. S. Pacific Co.*, 196 U.S. 1, 18-19 (1904).

The courts have enunciated two manners in which a plaintiff can establish the railroad's liability for an accident involving a coupling mechanism. The first avenue for establishing liability is to provide evidence that two cars failed to couple automatically upon impact. "[I]t is the failure to couple that triggers the railroad's absolute liability under section 2." *Lisek*, 30 F.3d at 829. In *Affolder v. New York C. & St. L.R. Co.*, 339 U.S. 96, 98 (1950), the Court held that the plaintiff could meet his burden under § 2 by showing a failure to couple automatically upon impact. The railroad's duty to have couplers which couple automatically upon impact "is an absolute one requiring performance 'on the occasion in question.' " *Id.* The plaintiff is not, therefore, required "to show a 'bad condition' of the coupler." *Affolder*, 339 U.S. at 99; *accord Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 130 (3d Cir. 1991) ("Because equipment failure itself suffices to fasten liability upon the railroad, an injured railworker need not show a defect in the coupler to recover for his injuries."). "In other words, the

Act requires automatic coupling equipment and the failure to couple creates the nearly irrebuttable presumption that the Act has been violated." *Lisek*, 30 F.3d at 829.

The second method of establishing a violation of the FSAA is to show a defect in the coupling equipment. Although a plaintiff is not required to prove that the equipment was defective, *see Affolder*, 339 U.S. at 99, evidence that an employee was forced to step in between the lines because of defective equipment can establish liability in "the absence of a failed coupling attempt." *Lisek*, 30 F.3d at 831. Furthermore, direct evidence of a defect obviates the need to determine whether the Act was violated by a failure to couple on the occasion in question. In *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 483-84 (1916), "evidence of bad repair in the equipment" was sufficient to establish liability and thus, the Court stated, "[w]e need not in this case determine . . . that the failure of a coupler to work at any time sustains a charge that the Act has been violated."

The railroad, however, "cannot be liable when it utilizes equipment that complies with the statutory mandate [and thus couples automatically upon impact] and is not defective." *Lisek*, 30 F.3d at 830. Therefore, two narrow defenses have emerged which, if properly proven by the railroad, may allow it to avoid liability. Both defenses address a situation where the coupler was not "set properly." *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 573 (6th Cir. 1994). Liability under § 2 "assumes that the coupler was placed in a position to operate on impact." *Affolder*, 339 U.S. at 99. The first defense, which was recognized by the Court in *Affolder*, is the failure of railroad workers to ensure that at least one of the couplers was in the open position before impact. *Id.* If both couplers' knuckles are closed, the failure of the couplers to couple automatically upon impact is not that of the device. The second defense is a misaligned drawbar. Since "it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railroad operations, then it is simply not reasonable to hold that such misalignment

amounts to a violation of the Act." *Lisek*, 30 F.3d at 830-31. In both instances, though, "the defendant railroad has the burden of proving that the couplers were not set properly at the time that they failed to couple automatically." *Kavorkian*, 33 F.3d at 573; *accord Maldonado v. Missouri Pac. Ry. Co.*, 798 F.2d 764, 768 (5th Cir. 1986), *cert. denied* 480 U.S. 932 (1987). "In other words, the defendant has to establish a separate cause for failure to couple, other than equipment failure." *Reed*, 939 F.2d at 132.

DeBiasio introduced evidence in support of both methods of establishing liability under the FSAA. Although no witness actually saw car 388423 fail to couple automatically upon impact, undisputed circumstantial evidence existed to support this conclusion. Wilson testified that the knuckle on car 388423 opened when he released the previous cut of three cars and Manestar confirmed that nothing unusual had occurred when those cars were released. Both DeBiasio and Manestar testified that they heard the cut of 6 cars make impact with the cars already standing on track 3. DeBiasio further testified that when he arrived at track 3 and discovered the gap, car 388423's coupler was closed. According to DeBiasio, based on his thirteen years of experience, this indicated that the cars had made impact but failed to couple automatically. The jury was entitled to conclude from this evidence that the couplers had failed to couple automatically upon impact and a § 2 violation had occurred. *See Clark v. Kentucky & Indiana Terminal R.R.*, 728 F.2d 307, 310-11 (6th Cir. 1984) (upholding the use of circumstantial evidence to establish the failure of a coupler to couple automatically upon impact).

DeBiasio also provided evidence that the coupling mechanism on car 388423 was defective. DeBiasio himself testified that the pin lifter malfunctioned when he tried to open the coupler. An IC videotape taken soon after the accident, which depicted an employee attempting to open the coupler with the pin lifter and having to resort to opening it manually, further supports evidence of a defect.

Finally, DeBiasio introduced two expert witnesses, Rufus Dipprey and Frank Appelt, who opined that the knuckle thrower DeBiasio attempted to open at the time of the accident was broken. While IC fiercely contested these conclusions, the jury was entitled to credit the testimony offered by DeBiasio.

IC cannot avail itself of either of the two defenses to liability under § 2. Other than asking a few hypothetical and conjectural cross-examination questions of DeBiasio and his witnesses, IC introduced no evidence to support a misaligned drawbar or closed coupler defense. To the contrary, the evidence indicated no support for such defenses existed. Wilson testified that car 388423's coupler was open when it was released, foreclosing an *Affolder* closed knuckle defense. DeBiasio further testified that he did not notice that either draw bar on either car was misaligned. Since a misalignment sufficient to prevent a coupling would be noticeable, DeBiasio concluded that there was no misalignment. Given that it was IC's burden to establish such defenses, the jury was entitled to conclude that there was no evidence of a misaligned drawbar or closed coupler in this case.

2. FELA

FELA provides a "broad remedial framework for railroad workers" who suffer injuries during their employment. *Lisek*, 30 F.3d at 831. Under 45 U.S.C. § 51, railroads engaging in interstate commerce

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under FELA, the plaintiff's burden is significantly lighter than in an ordinary negligence case. *Lisek*, 30 F.3d at 832.

The railroad is liable if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . ." *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)). A jury verdict in a FELA case can be set aside only when there is a complete absence of probative facts to support the conclusion reached. *Frazier*, 996 F.2d at 924.

DeBiasio introduced sufficient evidence of negligence for the jury to conclude that the "slightest evidence of negligence" test had been satisfied. Rule 103(c) of the Illinois Central Operating Rules states that "[w]hen coupling, shoving, or switching cars, care must be taken to prevent damage and to avoid fouling other tracks. There must be sufficient room on the track to hold the cars." DeBiasio testified that he informed Manestar that there was insufficient room on track 3 for the cut of 6 cars and, after impact with the cars already standing on track 3, they were indeed fouling the tracks. Dipprey, one of DeBiasio's expert witnesses, also testified that the tracks had been fouled in violation of Rule 103(c) when the cut of 6 cars was sent to track 3. Furthermore, there was evidence presented that IC had violated Operating Rule 833 by not maintaining "continuous radio contact" with DeBiasio so that he was informed of the next movement of cars, and it failed to maintain working lights at the area of the Yard where DeBiasio was injured. While the testimony was disputed on all of these points, the jury was entitled to credit DeBiasio's presentation of the evidence and hold IC liable, especially in light of FELA's low threshold for negligence.[2]

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[2] IC, in passing, suggests in its brief that the trial judge improperly charged the jury on averments of negligence not supported by the evidence. It does not point to any erroneous instruction. There was clearly evidence introduced to support each theory of negligence. That this evidence was contested does not merit rejection of a jury instruction on these points.

B. Evidentiary Rulings

The trial judge's evidentiary rulings are reviewed for abuse of discretion. *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 725 (7th Cir. 1994). The determination that an error was made does not end our inquiry, though, for not all errors warrant reversal of the verdict below. *Holmes v. Elgin, Joliet & Eastern Ry. Co.*, 18 F.3d 1393, 1397 (7th Cir. 1994). "[H]armless error with respect to the admission or exclusion of evidence is not cause for reversal." *Cook v. Navistar Int'l Transp. Corp.*, 940 F.2d 207, 212 (7th Cir. 1991) (quoting *Oriental Health Spa v. City of Fort Wayne*, 864 F.2d 486, 491 (7th Cir. 1988)). An erroneous evidentiary ruling is harmless and "does not affect substantial rights unless there is a significant chance that it has affected the result of the trial." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986); *see* Fed R. Civ. P. 61; Fed. R. Evid. 103(a).

1. Authentication of Exhibit 33

One of DeBiasio's expert witnesses, Frank Appelt, testified to the specific manner in which he believed car 388423's knuckle thrower was broken. Although he had not examined the actual knuckle thrower, he reasoned that "[t]he tail end of it off the fore end of it was broke off because it wouldn't contact the tail of the knuckle and push it open." (R. 411). IC sought to impeach this testimony by introducing exhibit 33, which IC claimed to be the actual knuckle thrower off the coupling mechanism in car 388423. The trial judge initially refused to allow IC to introduce exhibit 33, on the grounds that it had not been properly authenticated as the knuckle thrower in question, although he did permit IC's counsel to secure an admission from Appelt that exhibit 33 was not broken. During IC's presentation of its case, it introduced testimony from David Hall, the IC employee in charge of investigating the accident, that he had directed M.O. Jones to retrieve the coupler off of car 388423 and bring it to him. He also testified that the knuckle thrower Jones

brought to him was now labeled exhibit 33. At this point, the jury knew that exhibit 33 was not broken, but it did not know whether exhibit 33 was the actual knuckle thrower DeBiasio's expert had claimed to be broken. When IC called Jones to testify that he did indeed retrieve the knuckle thrower from the proper car and handed it to Hall, DeBiasio objected on the grounds that IC had not, under Fed. R. Civ. P. 26(a)(2) or Local Rule 5.00, disclosed Jones as an expert or the exhibits upon which he was going to rely upon in his testimony. IC countered that, at least insofar as he would authenticate exhibit 33 as car 388423's coupler, Jones was an impeachment witness not testifying as an expert at all. Moreover, his status as an expert had been revealed during deposition. Although he was allowed to testify as an expert, the trial judge ruled that Jones could not testify as to his actions in retrieving exhibit 33 from car 388423 because this testimony was not disclosed before trial.

The trial judge does appear to have abused his discretion in excluding Jones' testimony. Exhibit 33, if properly authenticated, was impeachment evidence for Appelt's testimony that the knuckle thrower had to be broken in a particular manner. The evidence was not offered to prove that the coupler could not be defective. It was offered only to establish that it could not have been defective in the manner described by Appelt. Rule 26(a)(3) of the Federal Rules of Civil Procedure does not require pretrial disclosure of evidence used "solely for impeachment purposes," and Local Rule 5.00 does not require nondemonstrative exhibits to be listed on the pretrial order unless they will be "offered in evidence."[3] Nor can Jones' testimony be excluded as undisclosed expert testimony. IC's counsel made clear to the trial judge that Jones'

[3] All demonstrative evidence or experiments to be offered during trial must be listed in the pretrial order, but exhibit 33, at least insofar as it was offered to impeach Appelt's testimony, was not demonstrative evidence or an experiment.

testimony regarding his handling of the coupler for car 388423 was separable from his testimony as an expert.[4] A witness is not an expert to the extent he testifies as to matters within his personal knowledge. *Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir. 1994). The bases of his opinions need not be disclosed before trial. *Id.* Thus, it was error for the trial judge to exclude the testimony which would connect up the coupler presented to Appelt with the coupler in car 388423.

Despite the error, we cannot say that it was reversible error. The authentication of exhibit 33 would have only addressed whether the coupling mechanism on car 388423 was defective. DeBiasio, however, presented undisputed evidence that the couplers had failed to couple automatically upon impact. This is sufficient to establish a violation of FSAA even if DeBiasio had never presented any evidence of a defect. *See Affolder*, 339 U.S. at 98-99. Since IC failed to provide any evidence to support a misaligned drawbar or closed knuckle defense, no reasonable jury could have failed to find such a violation. Thus, the error could not have affected the result of the trial. *Walton*, 786 F.2d at 313.

2. Day in the Life Video

DeBiasio offered into evidence a video depicting him in his daily routine since the amputation. IC objected that the video, which included frequent shots of him interacting with his family, would prompt the jury to award damages to him for his family's loss instead of solely as compensation for DeBiasio's injuries. *See New York C. & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917) (jury not entitled to consider damages for non-railroad employees). The trial judge viewed the video in its entirety

[4] Jones was in fact allowed to testify as an expert to the extent his testimony was disclosed to DeBiasio during his deposition. Only his testimony regarding the retrieval of the knuckle thrower from car 388423 was excluded.

outside the presence of the jury. When the video was displayed before the jury, the trial judge explicitly instructed the jury that they were not to consider the accident's harm to his family. Finally, DeBiasio was both present in the courtroom and subject to cross-examination. "The possibility that a film will be prejudicial is significantly reduced when the subject of that film can be cross-examined at trial." *Bannister v. Town of Noble, OK*, 812 F.2d 1265, 1270 (10th Cir. 1987) (discussing "Day in the Life" video). Thus, we do not find that the trial judge abused his discretion in admitting the video into evidence.

C. Damages

The jury returned a verdict of $4,201,000 in favor of De Biasio. $1,500,000 was apportioned for disability, $1,500,000 for pain and suffering experienced and reasonably expected to be experienced in the future, $51,000 for past lost earnings, and $1,150,000 for the value of lost future earnings reduced to present value. IC argues that the damage award is excessive in general, and in particular, the award for loss future earnings bears no rational connection to the evidence.

A trial judge may vacate a jury's verdict for excessiveness only when the award was "monstrously excessive" or the award has "no rational connection to the evidence." *Holmes*, 18 F.3d at 1395; *Frazier*, 996 F.2d at 925. When making this determination, "[t]he trial court may take into account whether the award is out of line when compared to other awards in similar cases." *Holmes*, 18 F.3d at 1396. We review the district court's decision not to order a remittitur or a new trial on damages under "the extremely limited abuse of discretion standard." *Frazier*, 996 F.2d at 925, (quoting *Joan W. v. City of Chicago*, 771 F.2d 1020, 1023 (7th Cir. 1985)).

1. Rational Connection Between Evidence and Award

IC first contends that the jury's award of $1,150,000 for the value of future lost earnings was not supported

by the evidence. All witnesses agreed that DeBiasio would be unable to return to work as a switchman as a result of the accident. DeBiasio offered the expert testimony of a professor of finance, Charles Linke, to estimate the amount of money DeBiasio would need today to replace his earnings as a switchman for the rest of his work life expectancy. Linke estimated that, including money earnings and loss of health care benefits, DeBiasio would need between $1,083,635 and $1,235,966 to replace his earnings as a switchman. DeBiasio therefore satisfied his general burden of introducing evidence as to the amount of money he is now prevented from earning as a switchman because of the accident. *See Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986) (citing *Shupe v. New York Cent. Sys.*, 339 F.2d 998, 1000 (7th Cir.), *cert. denied*, 381 U.S. 937 (1965)).

IC contends that the jury's award for loss of future earnings failed to take into account DeBiasio's ability to work in the future. Several of DeBiasio's medical experts admitted on cross-examination that his injury did not preclude him from working in some capacity in the future. DeBiasio admitted that he turned down two jobs offered to him by the railroad, one as a yardmaster and the other as a dispatcher, because of the stress he would suffer in returning to the environment in which he was injured. A psychologist testified that DeBiasio was justified in rejecting such jobs because of the effect they would have on his future mental health and stability. DeBiasio also testified that he had tried to work as a laborer in his brother's construction business, but had to quit after three weeks because he was developing tendinitis in his right arm.

DeBiasio clearly had the duty to mitigate his damages. *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 136 (2d Cir. 1993); *Jones*, 800 F.2d at 593. "However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." *Jones*, 800 F.2d at 593. IC did

secure admissions that DeBiasio's injuries did not foreclose his ever working again in any capacity. The only jobs IC contended were reasonably available to him, though, were the two jobs with the railroad which he would have been emotionally unable to handle according to his psychologist. IC presented no counter evidence that DeBiasio could have handled the jobs offered to him. Nor did IC offer any evidence as to other jobs available to DeBiasio and at what salaries. Considering his search for another job in his brother's business, and his chiropractor's testimony that he will continue to suffer muscle spasms and be subject to the risk of shoulder and back injury, the jury was entitled to find that DeBiasio had satisfied his duty to mitigate. In fact, the jury's award for lost future earnings was over $85,000 less than the upper range figures provided by Linke. Having failed to present competent evidence at trial of the potential future wages available to DeBiasio, IC cannot now complain on appeal that the jury failed to reduce his lost future earnings more than it did. *Cf. Aldridge v. Baltimore and Ohio R.R. Co.*, 789 F.2d 1061, 1068 (4th Cir. 1986) (Railroad failed to present evidence which would have permitted the jury to reduce the value of lost future earnings to present value). Thus, the trial court did not abuse its discretion in denying IC's motions for relief.

2. Excessiveness of the Verdict

IC cites two cases from this court in an attempt to demonstrate that the $4,201,000 awarded to DeBiasio was "monstrously excessive." Neither of these cases, however, is either factually similar, or even a FELA case, where large jury verdicts in state and federal court are not uncommon. *Frazier*, 996 F.2d at 926. In *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1262-63 (7th Cir. 1986), no one challenged the jury verdict of $3 million for a leg amputation and thus the issue was not before the court. Even so, the court's comment in dicta that "$3 million—only $170,000 of which represents lost earnings and past and future medical expenses—may well be excessive,"

does nothing to question the result in this case. In *Davis*, as the court's comment illustrates, the trouble with the verdict was not so much the amount as how much was apportioned to pain and suffering and disability. In the instant case, by contrast, $1.2 million of the damages represented lost earnings. Nor is *Mason v. F. LLI Luigi & Franco Dal Maschio*, 832 F.2d 383, 388 (7th Cir. 1987) instructive. In *Mason*, we upheld an $800,000 jury verdict for a woman who lost one-third of her right forearm. Yet, she found a job after the accident which paid her more than she had earned previously, and her lost wages and medical expenses were stipulated to be only $17,894.24. Thus, the circumstances justified a lower award than in the instant case.

Courts have often upheld large verdicts in FELA cases. In *Frazier*, this court upheld a $2.3 million award for a back injury for an individual who did not require continued medical treatment or prescription pain medication, and could lift objects weighing under fifty pounds. *Id.*, 996 F.2d at 926; *see Lewis v. Illinois Cent. R.R. Co.*, 600 N.E.2d 504, 506 (Ill. App. Ct. 1992) ($3,935,700 award for back injury). In *Schneider*, 987 F.2d at 137-38, a FELA jury verdict of $1.75 million was upheld "where the only physical injuries were multiple contusions, laceration of the tendon in the left thumb and laceration of the nerve in the left thumb." *Frazier*, 996 F.2d at 926. In *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472 (2d Cir. 1988), the jury awarded $3.5 million to a railroad employee whose kneecap was shattered. Finally, in *Merrill v. Chicago & Illinois Midland Ry.*, 751 F. Supp. 770 (C.D. Ill. 1990), after a FELA and FSAA trial, a jury awarded over $9 million to a mechanic at a coal transfer plant whose left arm was amputated during an attempt to rerail a derailed car. Although the case was ultimately dismissed, the jury verdict itself was not found to be excessive by the trial judge. *Id.* at 775 ("Were we not now allowing this cause to proceed to [Longshoreman and Harbor Workers' Compensation Act] proceedings, we would gladly enter judgment on that jury verdict.").

DeBiasio also cited several arm amputation cases in Cook County where similarly large verdicts were awarded.[5] *See, e.g., Cancino v. Goss & De Leuw, Inc.*, No. 78L-25744 (Cook Cty. Cir. Ct., July 10, 1987) ($3,560,607); *Skelton v. Chicago Transit Auth.*, No. 81L-28517 (Cook Cty Cir. Ct., April 14, 1989) ($7,824,655). When compared to these other awards, we cannot say that the jury's award to De Biasio is "monstrously excessive," or that the trial court abused its discretion in denying IC's motion for a new trial on damages.

III.

For the above reasons, the judgment is AFFIRMED in all respects.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] IC claims that the reported figures must be discounted because some of the awards were reduced for the plaintiff's contributory negligence or assumption of risk. These reductions, however, do not change the total amount the jury thought necessary, before adjusting for comparative fault, to make the plaintiff whole. In this case, the jury found DeBiasio to have not been contributorily negligent.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: April 13, 1995

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

No. 94-3000

STEVE DEBIASIO,

Plaintiff-Appellee

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 2281—Anthony A. Alaimo, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: August 30, 1995

TO: U. Stuart Cunningham
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Thomas F. Strubbe, Clerk

RE: 94-3000
DeBiasio, Steve v. IL Central Railroad
92 C 2281, Anthony A. Alaimo, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

* * * * *

BILL OF COSTS

[Omitted in printing.]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 1995

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

STEVE DEBIASIO,

Plaintiff-Appellee,

No. 94-3000 v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2281—Anthony A. Alaimo, Judge.

Upon consideration of the following:

1. MOTION TO STAY THE ISSUANCE OF THE MANDATE filed July 21, 1995, by the appellant.
2. RESPONSE TO MOTION TO STAY THE MANDATE filed July 27, 1995, by the appellee.

IT IS ORDERED that #1 is DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 17, 1995.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

STEVE DeBIASIO,

Plaintiff-Appellee,

No. 94-3000 v.

ILLINOIS CENTRAL RAILROAD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2281—Anthony A. Alaimo, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Walter J. Cummings did not participate in the consideration of the petition for rehearing.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:92-cv-02281

Title: Debiasio v. Illinois Cen RR

Assigned Judge: Honorable Paul E. Plunkett

MINUTE ORDER of 7/21/94 by Judge Anthony A. Alaimo: Ordered that defendant's post-verdict motions are hereby denied. Clerk of Court is directed to enter final judgment in accordance with the jury's verdict. Mailed notice

This order was entered on the docket by the Clerk July 25, 1994

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92-C-2281 Date: July 21, 1994

Name of Assigned Judge: Plunkett
Sitting Judge: Anthony A. Alaimo

Case Title: STEVE DeBIASIO
VS. ILLINOIS CENTRAL RAILROAD

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Ordered that defendant's post-verdict motions are hereby denied. Clerk of Court is directed to enter final judgment in accordance with the jury's verdict.

(11) ☒ [For further detail see order attached to the original minute order form.]

* * * * *

[Dated July 21, 1994]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION — NO. 92-C-2281

STEVE DeBIASIO,

Plaintiff,

v.

ILLINOIS CENTRAL RAILROAD,

Defendant.

ORDER

On May 23, 1994, a jury awarded Plaintiff $4,201,000.00, as compensatory damages for personal injuries suffered, in this action instituted pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*, and the Safety Appliance Acts, 45 U.S.C. § 2. Presently before the Court is Defendant's post-verdict motion, seeking as relief: (1) judgment as a matter of law or, in the alternative, (2) a new trial on all issues or, in the alternative, (3) a new trial on the issue of damages or, in the alternative, (4) an order of remittitur as with the compensatory damage award.

Having read and considered the arguments of counsel and evidence of record, Defendant's motion is hereby DENIED. In so ruling, the Court acknowledges the volume of arguments presented by Defendant in its motion and supplement thereto, but finds the arguments to be without merit and without need for detailed discussion. Moreover, the Court notes that the excerpts from

the trial transcript, utilized by Defendant in the subject motion, were taken in isolation and out of context, failing to convey the full import of the trial proceedings.

The Clerk of Court is hereby directed to enter final judgment in accordance with the jury's verdict.

SO ORDERED, this 21st day of July, 1994.

/s/ Anthony A. Alaimo
Judge, United States District Court
Southern District of Georgia
Sitting by Designation

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Supreme Court, U.S.
FILED
OCT 31 1995
CLERK

No. 95-599

In The

Supreme Court of the United States

October Term, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

vs.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court grant certiorari to consider a legal defense that was neither raised in the lower court nor supported by the evidence?

2. Did the District Court abuse its discretion in excluding certain evidence as a discovery sanction because it was not disclosed before trial?

3. Did the Seventh Circuit correctly decide that a purported error in excluding certain evidence was harmless when other undisputed evidence conclusively established a violation of the Safety Appliance Act?

4. Should the Supreme Court grant certiorari to render an advisory opinion concerning whether "impact speed" is a valid defense to a claim under the Safety Appliance Act, in a case where Petitioner-Railroad merely presented speculation that impact speed "*might*" have caused the failure of its equipment to automatically couple?

STATEMENT OF THE CASE

Petitioner complains about the District Court's decision to exclude certain testimony about a coupler (Exhibit 33). [Pet. for Cert. at 8-10.] But testimony about Exhibit 33 was excluded as a sanction because of Petitioner's conduct in failing to disclose this evidence before trial. *DeBiasio v. Illinois Central*, 52 F.3d 678, 686 (7th Cir. 1995).

The Court of Appeals decided the error in the exclusion was harmless because Exhibit 33 "would have only addressed whether the coupling mechanism on car 388423 was defective." *DeBiasio*, 52 F.3d at 686.

A violation of the Safety Appliance Act can be established both by proof that a coupler was defective and, alternatively, by establishing that it failed to automatically couple on impact. *DeBiasio*, 52 F.3d at 683. The excluded evidence was relevant only on the issue of whether the coupler was defective. *DeBiasio*, 52 F.3d at 686.

Respondent, however, "presented **undisputed** evidence that the couplers had failed to couple automatically upon impact." *DeBiasio*, 52 F.3d at 686 (emphasis added). This evidence proved a violation of the Safety Appliance Act, **"even if DeBiasio had never presented any evidence of a defect."** *DeBiasio*, 52 F.3d at 686 (emphasis added).

Because of the "undisputed" evidence of failure-to-couple, and the fact that Petitioner "failed to provide any evidence to support a misaligned drawbar or closed knuckle defense, no reasonable jury could have failed to find such a violation. Thus the error could not have affected the result of the trial." *DeBiasio*, 52 F.3d at 686.

The "undisputed" evidence of failure-to-couple obviated any need for expanding the scope of the court's harmless error analysis to consider the evidence that Respondent's injury was also caused by Petitioner's violation of its operating rules (as well as other acts of negligence which were independent of a coupler defect). The Seventh Circuit, however, noted "there was clearly evidence introduced to support **each** theory of negligence." *DeBiasio*, 52 F.3d at 685 (emphasis added).

Petitioner focuses on the penultimate sentence of the harmless error analysis (where the Seventh Circuit acknowledged that railroads can defend against Safety Appliance Act claims with a "misaligned drawbar or closed knuckle defense"). According to Petitioner, the court supposedly deprived it of the opportunity to assert, as a defense, that its equipment supposedly failed to couple because of the "operational circumstance" of "the impact speed of the cars to be coupled." [Pet. for Cert. at 11.]

In support of its "impact speed" defense, Petitioner relies on speculation that a coupler **might** fail to couple **if** it is "pushed away due to the impact speed before the open knuckle closes." [Pet. for Cert. at 7.] No witness is identified as having testified that "impact speed" caused the failure to couple in the present case.

Similarly, Petitioner does not claim that it presented any evidence in support of either a misaligned drawbar or closed knuckle defense. As the Seventh Circuit observed, "other than asking a few hypothetical and conjectural cross-examination questions of DeBiasio and his witnesses, IC introduced no evidence to support a misaligned drawbar or closed coupler defense. To the contrary, the evidence indicated no support for such defenses existed." *DeBiasio*, 52 F.3d at 684.

Tacitly assuming that it presented sufficient evidence to raise an "impact speed" defense, Petitioner attacks the Seventh Circuit's harmless error analysis as having supposedly ruled "as a matter of law that the **only two defenses available** to a railroad to a [Safety Appliance Act] claim are the operational circumstances of a misaligned drawbar and closed knuckle." [Pet. for Cert. at 10. (emphasis added).]

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to argue the legal validity of a defense that wasn't raised in the lower courts, and isn't supported by any evidence.

The Seventh Circuit had no reason to think it was being asked to consider whether "impact speed" constitutes a defense in a Safety Appliance Act case. This issue wasn't raised in Petitioner's opening brief before the Seventh Circuit. And Petitioner is only able to present speculation that its couplers "might" have failed to couple "due to the speed of the impact." [Pet. for Cert. at 10.]

Neither the District Court nor the Court of Appeals were presented with the legal issue of whether "impact speed" is a valid defense in a Safety Appliance Act case. The petition for certiorari therefore calls for application of the general rule that "ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

All of Petitioner's arguments about "impact speed" and "operational circumstances" are irrelevant to the Seventh Circuit's harmless error analysis. The error in excluding testimony about Exhibit 33 was harmless because there was undisputed evidence of failure to couple. This conclusion is

bolstered by all the evidence of multiple acts of negligence which were independent of any defect in the coupler.

Granting certiorari will merely lead to a re-examination of the unique facts and circumstances of this case, in revisiting the issues of whether the trial judge erred in excluding testimony as a discovery sanction, and whether the Seventh Circuit correctly concluded that an "apparent" error was harmless. Petitioner has inexplicably ignored the Supreme Court's blunt message: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Yet that is precisely the task Petitioner is asking the Supreme Court to undertake.

CONCLUSION

The Supreme Court should not accept Petitioner's invitation to render an advisory opinion concerning whether "impact speed" is a valid defense in a Safety Appliance Act case. Petitioner merely presented speculation that this "might" have caused the accident which resulted in the amputation of Respondent's dominant arm at the shoulder. The petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

Respondent raises four issues, none of which addresses the question presented for review by petitioner. Respondent makes no attempt in his opposition to dispute petitioner's contention that impact speed is an operational circumstance similar to closed knuckles or misaligned drawbars. The logic applied in this Court's decision in *Affolder v. New York, Chicago and St. Louis R.R.*, 339 U.S. 96 (1950), supports petitioner's contention that impact speed is an available defense to a cause of action under the federal Safety Appliance Act ("SAA"). Had the Seventh Circuit properly viewed impact speed as an operational circumstance giving rise to a "good defense" to a claim under the SAA, then the district court's error in barring defense counsel from adducing evidence that the knuckle

thrower, which respondent's own expert witness had described as non-defective, had been retrieved from the rail car in question could never have been considered harmless. When a failure to couple is due to the operational circumstance of impact speed and not due to any defect in the equipment involved, the non-defective nature of the coupling evidence is properly a defense to a claim under the SAA. This petition falls squarely within the scope of this Court's review in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995. Respondent makes no effort in his opposition to dispute petitioner's contention that a substantial conflict exists among state and federal courts over the interpretation of available defenses to a claim brought under the SAA, the issue common to both this petition and *Hiles*.

Contrary to respondent's argument in opposition, petitioner *did* raise the legal defense of impact speed at the district court level and in its briefs in the Court of Appeals. (R. 463-464, Petitioner's Brief to Seventh Circuit at pp. 12-13, 25-26.) Petitioner moved for judgment as a matter of law on respondent's SAA claim. One of the bases for which petitioner moved for judgment as a matter of law was on the ground that the coupler was non-defective and that the failure to couple was due to impact speed. (R. 463-464.) Petitioner specifically cited evidence regarding impact speed in its briefs before the Seventh Circuit. (Petitioner's Brief to Seventh Circuit at pp. 12-13, 25-26.) The Seventh Circuit never addressed the issue of impact speed in its decision but, rather, held as a matter of law that the only two defenses available to a defendant-railroad in an SAA claim are the operational circumstances of misaligned drawbars and closed knuckles. The Seventh Circuit's harmless error ruling was expressly predicated upon its erroneous ruling that the non-defective

nature of a coupler is pertinent only where there is evidence of a closed knuckle or a misaligned drawbar. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 13a).

Respondent also argues that the exclusion of the knuckle thrower, which would have established that the coupler was not defective in the manner claimed by respondent's experts, was harmless "when other undisputed evidence conclusively established a violation of the Safety Appliance Act." To this end, respondent relies entirely upon the fact that a failed coupling occurred and therefore specific evidence of defect was not necessary. This argument, of course, begs the question of whether impact speed is an available defense under the Safety Appliance Act. The logic of this Court's holding in *Affolder* that the operational circumstance of not properly setting the couplers provided the railroad with a "good defense" to a claim under the SAA, seemingly applies to other operational circumstances such as misaligned drawbars and impact speed. In fact, two circuits have so interpreted *Affolder* to apply to misaligned drawbars. *See Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *Reed v. Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991).

If impact speed is an available defense, then petitioner was entitled to introduce evidence of the non-defective nature of its equipment. Respondent's experts limited their opinions regarding a violation of the SAA to the sole theory that the knuckle thrower "had to be broken," notwithstanding that they never examined the subject coupler (R. 276, 408.) The foundational evidence regarding Exhibit 33, which was improperly barred by the trial court, would have proven that the knuckle thrower was not broken in the only manner suggested by respondent's experts. Indeed,

respondent's own expert witness conceded that Exhibit 33 was not defective. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 11a). Had the impeachment been allowed, respondent's own expert witness would have admitted that the coupler in question was non-defective. If impact speed is an available defense, such evidence should have been allowed. Respondent's opposition is silent as to why impact speed should not be considered an available defense similar to misaligned drawbars or closed knuckles.

Finally, respondent suggests that should this Court grant petitioner's petition for a writ of certiorari, its opinion would be merely an advisory opinion. Such is not the case. Respondent was improperly allowed to recover under an equipment statute, the SAA, for an incident involving non-defective equipment. This Court in *Affolder* and later circuit courts in *Kavorkian* and *Reed* have found that operational circumstances similar to impact speed, specifically, closed knuckles and misaligned drawbars, do not give rise to strict liability under the SAA, an equipment safety statute. Respondent's own expert conceded "I wouldn't be here today, no sir, nor would he have been injured" had the knuckle thrower not been broken in the manner that he had testified to at trial. (R. 229.) Had the evidence been allowed, petitioner would have been entitled to judgment as a matter of law as to respondent's SAA claim based on respondent's expert's admission that the knuckle thrower was not broken. The impeachment evidence would have refuted respondent's only theory under the SAA. Due to the trial court's erroneous ruling, the jury was not allowed to consider the non-defective nature of the equipment, and therefore petitioner was denied the right to present a defense it had available to it under the SAA. Instead, based on the trial court's error, the jury

was instructed under the SAA that plaintiff's comparative negligence was not a defense. Accordingly, the jury found no comparative fault on behalf of respondent. This erroneous finding of no comparative fault was based on jury instructions regarding respondent's SAA claim. The instructions regarding respondent's SAA claim certainly impacted on the jury's verdict regarding respondent's FELA claim. The trial court's error on a key piece of evidence pertaining to respondent's SAA claim directly resulted in an inflated FELA award for respondent.

The central issue to the present petition before this Court is whether impact speed is an operational circumstance similar to misaligned drawbars or closed knuckles which allows for a "good defense" to a cause of action under the SAA. This issue is similar to the issue before this Court in *Hiles*. Pursuant to this Court's holding in *Affolder*, petitioner submits that such a defense did exist in this case and therefore, petitioner was entitled to present evidence in this case regarding the non-defective condition of the equipment. The Seventh Circuit agreed that the trial court committed error in excluding such evidence. However, the Seventh Circuit failed to recognize impact speed as an operational circumstance defense to a claim under the SAA and therefore, the Seventh Circuit concluded that such error was harmless. The Seventh Circuit's decision was inconsistent with this Court's interpretation of the SAA. Moreover, the Seventh Circuit's decision is inconsistent with other federal circuits which have recognized other operational circumstances as defenses to a SAA claim.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and this Court should withhold its decision until it has ruled in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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Petitioner files this supplemental brief[1] pursuant to Rule 25.5 of the Rules of this Court for the purpose of presenting this Court's recent decision in *Norfolk & Western Ry. Co. v. Hiles*, No. 95-6, October Term, 1995, decided February 27, 1996 ("*Hiles*") as a relevant new decision which directly affects the issue presented in petitioner's petition for a writ of certiorari. In *Hiles*, this Court held that defenses available to a defendant-railroad in a failure-to-couple Safety Appliance Act ("SAA") case include not only a closed knuckle but also a mis-

[1] Petitioner's Rule 29.1 listing is contained in its petition for a writ of certiorari.

aligned drawbar and that this Court's decision in *Affolder v. New York, Chicago and St. Louis R.R.*, 339 U.S. 96 (1950) "logically extends to every step necessary to prepare a non-defective coupler for coupling." (*Hiles*, slip op. at p. 11.) This is precisely the position presented by petitioner in its petition for a writ of certiorari.

As this Court held in *Hiles* and as this petitioner argued in its briefs, this Court's decision in *Affolder* logically dictates that circumstances other than a closed knuckle which occur during the normal operation of a railroad are good defenses to a claim under the SAA when as here, the railroad can show the presence of non-defective automatic couplers. This unanimous Court instructed in *Hiles*:

> Though *Affolder* involved a claimed closed knuckle, its language was not so limited and, as a matter of common sense, could not have been.

Hiles, slip op. at p. 11

The same logic which led this Court in *Hiles* to apply the *Affolder* decision to a misaligned drawbar supports a finding that impact speed is also an available defense to a failed couple case under the SAA. Respondent herein admitted that impact speed can result in a non-coupling even though there is no defect in the equipment. Respondent conceded that impact speed is an operational circumstance that occurs during the normal operation of a railroad. Similar to a closed knuckle and a misaligned drawbar, impact speed which results in a non-coupling of non-defective equipment should be available as a defense to a railroad in a failed couple case where the defendant can show non-defective equipment was involved.

In this case, the United States Court of Appeals for the Seventh Circuit adopted an erroneous view of this

Court's decision in *Affolder*, similar to the erroneous view adopted by respondent in *Hiles*. The Seventh Circuit concluded that only two "narrow" defenses have emerged to a failed couple claim, those of a closed knuckle and a misaligned drawbar. *DeBiasio v. Illinois Central R.R.*, slip. op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 6a-9a). Petitioner raised the defense of impact speed in the district court and in its briefs to the Court of Appeals. Petitioner specifically cited evidence regarding impact speed in its briefs before the Seventh Circuit. The Seventh Circuit, however, never addressed the issue of impact speed in its decision due to its strict and limited application of *Affolder* rather than *Affolder*'s plain logic. The Seventh Circuit's harmless error ruling was expressly predicated upon its erroneous finding that the non-defective nature of a coupler is pertinent only where there is evidence of a closed knuckle or a misaligned drawbar. (Petitioner's Appendix at 13a.)

Affolder and *Hiles* make clear that certain circumstances which, in the words of *Hiles*, "are part of the normal course of railroad car operations" are not actionable violations of the Safety Appliance Act in cases such as the present one. (*See Hiles*, slip op. at p. 13.) This Court has specifically included closed knuckles (*Affolder*) and misaligned drawbars (*Hiles*) as being such normal railroad operations, and makes clear in *Hiles* that closed knuckles and misaligned drawbars are not the only two circumstances arising out of normal railroad operations which are available defenses to a failed couple SAA claim. (*See Hiles*, slip op. at p. 11 and at pp. 12-13, note 15.) Petitioner defined "operational circumstances" in its petition for a writ of certiorari as being "those situations that normally occur during railroad operations when equipment is in good working condition which prevent a

coupling from occurring." (Pet. for Cert. at p. 11.) This definition is entirely consistent with this Court's decisions in *Affolder* and *Hiles*. Petitioner respectfully submits that impact speed, like a closed knuckle and a misaligned drawbar, is a circumstance which occurs during the normal operation of a railroad. Therefore, impact speed should be an available defense to a claim under the SAA. Respondent conceded at trial that in the normal course of railroad operations impact speed can result in the non-coupling of non-defective railroad equipment. Respondent's experts limited their opinions regarding a violation of the SAA solely to the theory that the knuckle thrower "had to be broken." (R. 276, 408.) The foundational evidence regarding Exhibit 33, which was improperly barred by the district court, would have proven that the knuckle thrower was not broken in the manner claimed by respondent's experts. Indeed, respondent's own expert witness conceded that Exhibit 33 was not defective. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 11a).

The Seventh Circuit agreed that the district court committed "significant" error in excluding such evidence. The Seventh Circuit failed to recognize, however, impact speed as an operational circumstance giving rise to a defense to a claim under the SAA. Therefore, the Seventh Circuit erroneously concluded that the district court's error was harmless. The Seventh Circuit's decision is inconsistent with this Court's interpretation of the SAA. Based on this Court's decisions in *Affolder* and *Hiles*, the Seventh Circuit's interpretation of available defenses under the SAA is unduly restrictive and erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Seventh Circuit should be reversed and this matter remanded to the trial court for further proceedings consistent with this Court's decision in *Hiles* or the petition for a writ of certiorari should be granted and this case should be remanded to the Seventh Circuit for further proceedings consistent with this Court's decision in *Hiles* or petitioner prays that this Court provide such other relief this Court deems just and proper.

Respectfully submitted,

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